88-1572

Supreme Court, U.S.
FILED
FEB 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE SUPREME COURT

of the

UNITED STATES

October Term, 1988

BERNARD CLARK, JR.,
Petitioner

v.

COMMONWEALTH OF VIRGINIA,
Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF VIRGINIA

Malcolm G. Crawford, Esquire
Counsel of Record for the
Appellant
15 South Jefferson St.
Lexington, Virginia 24450
(703) 463-9796

52 MP

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

Your petitioner, Bernard Clark, Jr., prays that a Writ of Certiorari be issued to review the decision of the Supreme Court of Virginia to his case.

QUESTION PRESENTED

Does the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution prohibit (absent consent of the criminal defendant or the knowing and intelligent waiver of the defendant's spouse) a State's judiciary considering for the purpose of determining a proper sentence, the incriminating statements of the spouse to a probation officer of the trial court if the state legislature has enacted a criminal procedure statute providing that neither a husband nor wife "shall be compelled, nor, without the consent of the other, allowed to be called as a witness against the other....", and the state's highest appellate court has held that in said state extra-judicial statements "are equally privileged with testimony on the stand."

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED 1

TABLE OF CONTENTS 2

TABLE OF CITATIONS 3

OPINIONS BELOW 4

JURISDICTION 6

CONSTITUTIONAL PROVISIONS INVOLVED . 5

STATEMENT OF THE CASE 6

REASONS FOR ISSUANCE OF THE WRIT . .13

CONCLUSION 24

APPENDIX

Order of Supreme Court of Virginia
. . . . . A-1 - A-2

Order of Court of Appeals of Virginia
. . . . . A-3 - A-5

Order of Conviction from Trial Court
. . . . . A-6 - A-10

Order from Trial Court directing
examination of Defendant . A-11 - A-14

Letter to Judge . . . . . A-15 - A-18

Section 19.2-271.2 . . . . . A-19 - A-20

Section 19.2-299 . . . . . A-21 - A-24

Section 19.2-300 . . . . . A-25

Amendment XIV, Section 1 . . . . A-26

TABLE OF CITATIONS

Constitutions

Constitution of the United States Amendment XIV 4, 11

Constitution of Virginia, Art. I, Section 8 12

Statutes

Section 19.2-271.2 - Code of Virginia 1950, as amended 4, 8, 13

Section 19.2-299 - Code of Virginia 1950, as amended 4, 5, 15

Section 19.2-300 - Code of Virginia 1950, as amended 4, 5

Cases

Appeal of Malfitano, 633 F.2d 276 (3rd Cir. 1980) 21

Hawkins v. United States, 368 U.S. 74, 79, 79 S.Ct. 136, 139 (1958) 14

Jordan v. Massachusetts, 225 U.S. 167, 171 (1912) 12

McMillan v. Commonwealth, 188 Va. 429 (1948) 14

Shiflett v. Commonwealth, 447 F2d 50 (4th Cir. 1971) 14

State v. Emehiser, 106 Id. 203, 677 P2d 516 (1984) 18

State v. Schier, 47 Or.App. 1075, 615 P2d 1147 (1980) 18

Trammel v. United States, 445 U.S. 40 (1979) 14, 19, 20, 21

United States v. Crouthers, 669 F. 2d 635 (10th Cir. 1982) 21

United States v. Grayson, 438 U.S. 41, 50, 98 S.Ct. (1978) 3, 16, 17

Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079 (1949) 16, 17

REFERENCE BOOKS

Am Jur. 2, Const. Law, Section 811 . .12

OPINIONS BELOW

Subsequent to a finding of guilty of Aggravated Sexual Battery, the trial court ordered a pre-sentence report and a mental examination of the defendant. Each of these reports contained numerous incriminating statements by the defendant's wife. Trial defense attorney objected to the court's consideration of these reports in that they amounted to

testimony privileged under Section 19.2-271.2 of the Virginia Code 1950 as amended. At that time the court ruled the reports admissible. The final order of the trial court is set out in the Appendix. The Court of Appeals of Virginia issued a written opinion dated June 24th, 1988 stating that the reports were admissible for consideration in the presentencing report and citing United States v. Grayson No written opinion was delivered by the Supreme Court of Virginia in refusing Mr. Clark's Petition for Appeal on December 20, 1988. The order of the Court of Appeals and the order of the Supreme Court are set forth in the Appendix.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves Amendment XIV of the Constitution of the United States and Sections 19.2-299, 19.2-300 and 19.2-271.2 of the Code of Virginia 1950, as amended. Said Constitutional amendments and statutes are set forth in the Appendix.

JURISDICTION

The jurisdiction of the court is invoked pursuant to 28 U.S.C. Section 1257 (3). The Supreme Court of Virginia affirmed Petitioner's conviction by denying Petitioner's Petition for Appeal on December 20, 1988. This Petition is therefore timely filed pursuant to Sup. Ct. Rule 20.1.

STATEMENT OF THE CASE

Bernard Clark, Jr. was indicted upon a charge that he did on or about

April 15, 1985, in the City of Buena Vista, Virginia, unlawfully and feloniously commit aggravated sexual battery on Rose Lam, a juvenile less than thirteen years of age. On June 8, 1987, Mr. Clark entered a plea of not guilty and waived trial by jury. At the conclusion of the evidence, the trial judge found the defendant guilty and ordered that a presentence report pursuant to 19.2-299 and a mental examination of Mr. Clark under Section 19.2-300 be prepared. By letter dated September 16, 1987, Walter J. Obenschain, the probation and parole officer of the Department of Corrections, District 12, forwarded to the court his report dated September 8, 1987. By letter dated September 17, 1987, Dr. Emily Hardy, forwarded a copy of the psychological evaluation to the court. Copies of these reports were sent to the Commonwealth's

Attorney and to the counsel for the defendant. Upon receipt of these reports, counsel for defendant called the Commonwealth's Attorney to object to the inclusion in these reports of certain statements made by the defendant's wife, which were included in the reports. The Commonwealth's Attorney requested that defendant's objections be in writing, and an agreement was reached between the Commonwealth's Attorney and defense counsel that they would attempt to resolve this point of law prior to the court reading the reports. On or before September 21, 1987, counsel for the defendant telephoned Susan White, the secretary for the Honorable George E. Honts, III, and was assured that the reports would not be read by the court until either the matter was resolved by counsel for the defendant and the

Commonwealth's Attorney, or argued before the court and a decision reached by the court. On September 21, 1987, counsel for the defendant forwarded a letter to the Commonwealth's Attorney. A copy of said letter is attached to defendant's motion to set aside or reduce the sentence filed November 13, 1987, and is set forth in the appendix.

Prior to the sentencing hearing on November 4, 1987, counsel for the defendant again moved the court in chambers not to consider said reports, and the court ruled with the consent of the Commonwealth's Attorney that the court would consider the psychological report with any quotations from the defendant's wife deleted. Prior to the actual sentencing hearing, counsel for the defendant put on record his

objections to the consideration of the reports including his objections to the statements of Mrs. Clark which he claimed were testimony to which Mr. Clark might timely object as set forth in Section 19.2-271.2. At the sentencing hearing, the Commonwealth called the probation officer who testified that he had prepared the pre-sentence report and that it was accurate to the date of the report. However, the trial judge acknowledged he read the report on September 21, 1987, the same date that defense counsel received his copy. This report contained the following paragraph:

> Mrs. Clark states she and her husband's marriage is that in name only. She said they have not gotten along for years and over the last five years especially theirs has been a troubled union. She claims she sued for divorce approximately four years ago but stopped proceedings when her husband agreed to mend his ways. Lately she has asked him to leave the home on several occasions, which he does for short periods of time, but always

returns claiming that since he helped to pay bills there he should be allowed to stay there as he pleases. She has entertained thoughts of obtaining a legal separation but has not yet definitely decided to do this. Among her reasons for wanting to dissolve the union is alleged infidelity on the subject's part. She said she knew for a fact that several years ago he was seeing a young lady in the state of Kentucky who was approximately 16 years of age. According to Ms. Clark, this young girl eventually exposed the relationship to her parents and other church members there and the subject left town. She also does not agree with the way the subject treats their children. Their oldest son Anthony has a drinking problem which she attributes to their troubled home situation and their oldest daughter Salina has also left the home. This daughter has drinking and emotional problems which Mrs. Clark feels are directly related to her husband's past alleged sexual abuse of this daughter. She said this latest offense only confirms what she felt all along and that was that not only she needed to see a counselor to help her deal with the family situation but that her husband had definite problems that needed to be addressed by a mental health professional. She says her husband is extremely hard to talk to and that he will not ever admit he could make a mistake and always sees himself as the controller in the family who must counsel his wayward family. The subject's wife says that although the subject claims to support his family all he does is leave money occasionally for utilities and for the

family to buy food. She says that subject's relatives own the house and they have no rent to pay.

The original report of Dr. Hardy contained numerous quotations from the defendant's wife, including:

Mr. Clark denies any extra marital sexual relationships during his second marriage. Ms. Ruth Clark, however, thinks that he has had extra-marital sexual relationships, and notes that one 16 year old girl confessed in church to a relationship with Mr. Clark, and that the girl's "mother knows about it." Ms. Clark, also notes that "girls at school would tell our daughter that her father (Mr. Clark) tried to proposition" them.

His wife saw him masturbating in front of the TV after the family had gone to bed about 3 years ago, and talked with him about it because the TV room is open and accessible to the children. She states Mr. Clark "got angry and walked away," and yelled at her, "if you were the woman you should be I wouldn't have to do it."

Ms. Clark states that their daughter (Selena, now 22) was sexually abused by Mr. Clark as a child, and that Selena has acknowledged that her father did "the same thing he did with Rose." Ms. Clark reports that Selena told her aunt and Social Services that Mr. Clark completed the "full sex act" with her. Ms. Clark reports that Selena and her father were "inseparable until this happened."

Upon completion of all the evidence at the sentencing hearing, the court ordered the defendant sentenced to a term of five years in the state penitentiary. A Notice of Appeal was filed in the Circuit Court on November 30, 1987. A Petition for Appeal was filed in the Court of Appeals on January 20 1988, which was denied by said Court on June 24, 1988. Mr. Clark's petition for appeal to the Virginia Supreme Court was denied on December 20, 1988.

REASON FOR ISSUANCE OF THE WRIT

This case presents the important issue whether the Fourteenth Amendment to the U.S. Constitution through its Due Process clause requires the Courts of Virginia to comply with the statutes of the state. It is submitted the Courts unconstitutionally considered prejudicial

statments of Mr. Clark's wife made to a probation officer who included them in his report to the Court.

The term "due process of law" as used in the Federal Constitution has been repeatedly declared to be the exact equivalent of the phrase "law of the land...." Am. Jur. 2d. Const. Law, Section 811. "Due process of law... requires that the conduct of the case be in accordance with the regular procedure of the State...." Jordan v. Massachusetts, 225 U.S. 167, 171 (1912). The Virginia Constitution specifically states that a person "shall not be deprived of life or liberty, except by the law of the land...." Article I, Section 8. Therefore, a states denies its citizens Due Process of Law if it fails to conduct trials in accordance with its own laws and "the law of the land."

Mr. Clark's trial was not conducted pursuant to the duly enacted laws of the Commonwealth of Virginia. The presentence report and the report of the Rockbridge County Mental Health Clinic both contained prejudicial quotations of the defendant's wife. Under Section 19.2-271.2, one spouse may not testify against the other over the objection of the defendant except under certain circumstances not present here. This statute specifically states that "[i]n criminal cases ... neither shall be compelled, nor, without the consent of the other, allowed to be called as a witness against the other...." (Emphasis added). It is submitted that it would have been improper (and her testimony would have been disallowed if objected to by the defendant) if the Commonwealth had attempted to call Mrs. Clark and use her

as a witness in the sentencing hearing. The fact that her "testimony" was contained in a presentence report should not permit the Commonwealth to make an end-run around this particular statute. The Virginia Supreme Court has held in McMillan v. Commonwealth, 188 Va. 429 (1948): "any extra judicial statement made by one spouse against the other is likewise inadmissible". The court further stated "extra judicial admissions are a sort of testimony; hence they are equally privileged with testimony on the stand." Id. at 433. See also Shiflett v. Commonwealth, 447 F.2d 50, 58 (4th Cir. 1971) discussing the foregoing Virginia law. Although this honorable Court in Trammel v. U.S., 445 U.S. 40 (1979), has overruled Hawkins v. United States, 358 U.S. 74 (1958) which had earlier confirmed the viability of the marital privilege, this change was specifically

authorized by Congress in the Federal Rules of Evidence. Congress authorized the federal courts to modify testimonial privileges in federal criminal trials "governed by the principles of the common law as they may be interpreted .. in the light of reason and experience." Fed. Rule Evidence. 501. No such mandate has been given by the state legislature to the Courts of Virginia. The statute clearly and succinctly states the privilege is available in "criminal cases." Furthermore, Section 19.2-299, which sets forth the procedure to be followed by probation officers, simply directs such officer "to thoroughly investigate and report upon the history of the accused and any and all other relevant facts, to the end that the court may be fully advised as to the appropriate and just sentence to be imposed." Nothing in said statute

authorizes or directs the probation officer to invade the defendant's home, and without his consent, ferret out his history from his wife, and then provide it to his sentencing judge.

The Commonwealth argued in its brief to the Supreme Court that the marital privilege is not applicable to statements contained in a presentence report. The Court of Appeals of Virginia, affirmed by the Supreme Court of Virginia, held without opinion the procedure followed was permissible and not error because of this Court's decision in U.S. v. Grayson, 438 U.S. 41 (1978). Grayson held that the trial judge in a federal prosecution could consider evidence that the defendant lied in the case in chief when considering an appropriate sentence. Although the Grayson court upheld the sentencing principle set forth in Williams v. New

York, 337 U.S. 241, 69 S.Ct. 1079 (1949) that "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider or the source from which it may come," at p. 50, neither Grayson nor Williams considered the marital privilege nor this situation where the state court failed to follow its duly enacted laws. Implicitly, the Court of Appeals opined that the marital privilege enacted by the legislature is not applicable to pre-sentence reports. This, of course, ignores the statute which simply refers to "criminal cases" and does not limit its application to the determination of guilt or innocence. Other than this Court's opinion in Grayson, no other explanation has been given as to the reason state law was not followed. No published case has been

discovered by counsel that would allow, per se, this testimony in a presentence report. In State v. Schier, 47 Or.App. 1075, 615 P2d 1147 (1980), the state argued the marital privilege was not applicable in a probation revocation hearing. In overruling this contention, the Oregon Court of Appeals held: "The public policy of preserving the marital relationship is not dependent upon the type of judicial proceedings in which the testimony is sought to be elicited. The marriage is equally subject to injury whether the proceedings involve a trial or a probation revocation hearing." at p. 1149-1150. The closest case counsel discovered addressing this specific issue was the decision of the Court of Appeals of Idaho in State v. Emehiser, 106 Id. 203, 677 P.2d 516 (1984). In holding the statement of the wife concerning an assault on another woman by her husband

admissible in a presentence report, the Idaho Court specifically made note of the fact that the husband and wife were separated, and "under these circumstances" the public policy of the marital privilege was overridden by the policy of providing sentencing judges complete information about the defendants' background. In this case, Mr. Clark and his wife were not separated and are still living together. Although the Trammel court limited the scope of the marital privilege, nothing in this opinion indicates that the basic values of family and marriage are not to be encouraged and preserved in any case where it is not clearly apparrent that the marriage has irrevocably broken down.

Even in jurisdictions that follow the present Federal Rule enunicated in Trammel, the witness-spouse has the

choice whether to give evidence against the defendant-spouse. As stated in Trammel, "... vesting the privilege in the witness-spouse furthers the important public interest in marital harmony without unduly burdening legitimate law enforcement needs." Supra, at p. 53. It is submitted, that prior to a state using a spouse's testimony, the record must be clear that the spouse was adequately warned that her statements given to a probation officer would be used in a court against her husband. Thus, procedures should be adopted and followed that would ensure that such statements are voluntary and are not compelled by the officer of the Court asking questions a spouse may not feel free to refuse to answer. If one wishes to waive his or her right not to furnish testimony against a defendant spouse, the waiver

must be intelligent and knowing. U.S. v. Crouthers, 669 F.2d 635, 642 (10th Cir. 1982). Appeal of Malfitano, 633 F. 2d 276, 280 (3rd Cir. 1980). In many cases, the choice will be obvious, e.g. in Trammel, the spouse chose to testify for personal immunity. In the instant case, it is unclear whether Mrs. Clark desired to testify against him or whether her statements to the probation officer were simply a cry for help. Certainly there is nothing in the record that shows Mrs. Clark knew her statements would be used against her husband. Absent this, such statements are not a knowing and intelligent waiver of her right guaranteed by all jurisdictions not to be compelled to testify against her spouse.

CONCLUSION

Wherefore, it is respectfully submitted that the Courts of Virginia have denied your petitioner Due Process of Law in that they have failed to follow the law of the Commonwealth that grants unto a criminal defendant and his spouse the right to refuse to allow the spouse to testify, or in fact, even be called as a witness. This Court has never held that a State is free to disregard its own Constitutional laws. Therefore, it is respectfully submitted that this case should be remanded to the Supreme Court of Virginia for a determination of the law in Virginia and with instructions that it be followed.

Respectfully submitted,

BERNARD CLARK, JR.

BY_____

M. G. Crawford, Esquire
15 South Jefferson St.
Lexington, VA 24450

CERTIFICATE

I, Malcolm G. Crawford, do hereby certify that three copies of the Petition for Certiorari were mailed to Michael Irvine, Esquire, Commonwealth's Attorney for the City of Buena Vista, 131 21st Street, Buena Vista, Virginia 24416 this 17th day of February, 1989, by depositing said copies in a United States mail box, with first-class postage prepaid addressed to above counsel of record at his above post office address.

/s/ M. G. Crawford

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 20th day of December, 1988.

Bernard Clark, Jr., Appellant

against Record No. 880834

Court of Appeals No. 1485-87-3

Commonwealth of Virginia, Appellee

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court refuses the petition for appeal.

The Circuit Court of the City of Buena Vista shall allow court-appointed counsel the fee set forth below and also his necessary direct out-of-pocket

expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this Court and in the courts below.

A Copy,

Teste:

David B. Beach, Clerk

by: /s/ Debra A. R. Clem

Deputy Clerk

Costs due the Commonwealth by appellant in Supreme Court of Virginia:

Attorney's Fee: $300.00 plus his costs and expenses

Filing Fee: 25.00

Teste:

David B. Beach, Clerk

By: /s/ Debra A. R. Clem

Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Friday, the 24th day of June, 1988.

Bernard (NMN) Clark, Jr., Appellant,

against Record No. 1485-87-3

Circuit Court No. A804-4

Commonwealth of Virginia, Appellee

From the Circuit Court of the

City of Buena Vista

Before Chief Judge Koontz,

Judges Keenan and Cole

This petition for appeal is denied for the following reasons:

1. Upon consideration of the totality of the circumstances, Wyrich v. Fields, 459 U.S. 42 (1982), advisement of the petitioner's Miranda rights was not required.

2. The trial court did not abuse its discretion in denying the

petitioner's motion for a mistrial.

3. The trial court did not err in considering the complete pre-sentence report and the Mental Health Clinic of Rockbridge County for the purpose of sentencing, U.S. v. Grayson, 438 U.S. 41 (1978).

The trial court shall allow court-appointed counsel the fee set forth below and also his necessary direct out-of-pocket expenses. The Commonwealth shall recover of the appellant the costs in this Court and in the trial court.

A Copy,

Teste:

David B. Beach, Clerk

By: A. R. Re

Deputy Clerk

Costs due the Commonwealth

by appellant in Court of

Appeals of Virginia

Attorney's Fee: $300.00 plus his costs and expenses

Filing Fee: 25.00

Teste:
David B. Beach, Clerk

By: A. R. Re.

Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF BUENA VISTA, NOVEMBER 4, 1987

PRESENT: THE HONORABLE GEORGE E. HONTS, III, Judge

IN RE:

COMMONWEALTH OF VIRGINIA	
VS	Aggravated
BERNARD NMN CLARK, JR.	Sexual Battery
225-44-3584	Section 18.2-67.3
DOB 02-19-37	

O R D E R - Felony No. A804-4

This day came again the attorney for the Commonwealth, Michael S. Irvine and BERNARD NMN CLARK, JR., age 50, who stands convicted of a felony, to-wit: Aggravated Sexual Battery, Section 18.2-67.3, Code of Virginia, and came also Malcolm G. Crawford, his attorney, heretofore appointed.

And the Probation Officer of this Court, to whom this case has been previously referred for investigation, appeared in open court with a written report, which report he presented to the Court in open court in the presence of the defendant who was fully advised of the contents of the report and a copy of said report was also delivered to counsel for the accused.

Thereupon the defendant and his counsel were given the right to cross-examine the Probation Officer as to any matter contained in said report and to present any additional facts bearing upon the matter as they desired to present. The report of the Probation Officer is hereby filed as a part of the record in this case.

Whereupon the Court taking into

consideration all the evidence in the case, the report of the Probation Officer, the matters brought out on cross-examination of the Probation Officer, the presentence evaluation prepared by the Rockbridge Area Mental Health Clinic and such additional facts as were presented by the defendant, and it being demanded of the defendant if anything for himself he had or knew to say why judgment should not be pronounced against him according to law, and nothing being offered or alleged in delay of judgment, it is accordingly the judgment of this Court that the defendant is hereby sentenced to confinement in the penitentiary of the Commonwealth of Virginia for a term of five (5) years, and that the Commonwealth of Virginia do recover against the said defendant its

costs by it about its prosecution in this behalf expended. The Court recommends that the prisoner receive evaluation and treatment while incarcerated. The Court certifies that at all times during the trial of this case the defendant was personally present with his attorney and he was fully advised of his rights regarding appeal.

The defendant, by counsel advised the Court that he did wish to appeal his case and moved the Court to allow him to remain on bond, which motion the Court granted on condition that the defendant not leave the Commonwealth, refrain from the use of alcohol and that he not associate with females under the age of 18 years unless accompanied by an adult.

The Court directed the Clerk to have a transcript of the record prepared

which will be made a part of the record in this case.

s/ George E. Honts
JUDGE

DATE: November 4, 1987

Entered: 11-4-87

A copy teste:

Betty S. Hall, Clerk

Circuit Court, City of Buena Vista

By /s/ Betty S. Hall

Law Order Book No. 11

Page: 391-392

BOOK 11, page 270

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF BUENA VISTA, JUNE 8, 1987

PRESENT: THE HONORABLE GEORGE E. HONTS, III, Judge of said Court.

IN RE:

COMMONWEALTH OF VIRGINIA	
VS	Aggravated
BERNARD NMN CLARK, JR.	Sexual Battery
225-44-3584	Section 18.2-67.3
DOB 02-19-37	

O R D E R - Felony No. A804-4

This day came again the Attorney for the Commonwealth, Michael S. Irvine and BERNARD nmn CLARK, JR., age 50, who stands indicted for a felony, to-wit: Aggravated Sexual Battery and came also Malcolm G. Crawford, his attorney,

heretofore appointed.

Whereupon the accused was arraigned and after private consultation with his counsel, pleaded not guilty to the Indictment, which plea was tendered by the accused in person. And thereupon, after having been first advised by his attorney and by the Court of his right to trial by jury, the accused knowingly and voluntarily waived trial by a jury and with the concurrence of the Attorney for the Commonwealth and of the Court, here entered of record, the Court proceeded to hear and determine the case without the intervention of a jury, as provided by law, and having heard the evidence and argument of counsel finds the accused guilty of Aggravated Sexual Battery, Section 18.2-67.3, Code of Virginia, as charged in the Indictment.

The Court, before fixing punishment or imposing sentence, directs the Probation Officer of this Court to thoroughly investigate and report to the Court as provided by law, and in addition the Court directs that the Rockbridge Mental Health Clinic examine the defendant and report to this Court pursuant to Section 19.2-300, Code of Virginia. The Court further directs that the Probation Officer prepare a Victim Impact Statement concerning the victim of this offense.

Sentencing in this case will be set at such time as the above reports are concluded and this case is continued until such time.

The Court certifies that at all times during the trial of this case the

defendant was personally present with his attorney.

And the defendant is to remain on bond under the same terms and conditions.

s/ George E. Honts
Judge

Date: June 8, 1987

Entered: 6-8-87

Law Order Book No. 11

Page 270-271

October 2, 1987

The Honorable George E. Honts, III
Circuit Court for the City of Buena Vista
Court House of Rockbridge County
Lexington, VA 24450

Re: Commonwealth v. Bernard Clark

Dear Judge Honts:

Following the conviction of Mr. Clark, the court ordered a pre-sentence report and a psychological evaluation pursuant to Section 19.2-300 of the Code of Virginia. I have received copies of these reports, and I understand that the originals have been sent to you, but upon my request, you have not read the reports as of this date. Each of these reports contains statements and information

obtained form Mrs. Clark to which Mr. Clark objects. It is submitted that these statements are either privileged communications under Section 8.01-398 or amount to testimony to which Mr. Clark may timely object as set forth in Section 19.2-271.2 of the Code of Virginia. Although these statements are extrajudicial, it is the law of Virginia as set forth in McMillian v. Commonwealth, 188 Va. 429 that the statements are inadmissible. At page 433 of the above case referring to the predecessor of 19.2-271.2, it was stated "under the provisions of this statute one spouse is not a competent witness against the other. (citation omitted). Any extrajudicial statement made by one spouse as such against the other is

likewise inadmissible".

Although the objectionable statements are contained in reports ordered by the court for sentencing purposes, it is submitted that Section 19.2-271.2 which in turn incorporates Section 801-398 makes no distinction between the actual trial of the matter and sentencing and simply refers to "criminal cases". A copy of each of these statutes is submitted for your convenience.

In light of the foregoing, it would be appreciated if you would return the reports to the makers thereof with the directions not to include in the report any references or conclusions reached as a result of statements of Mrs. Clark.

Thank you for your attention to this.

Respectfully yours,

M. G. Crawford

cc Michael Irvine, Esquire

Betty Hall, Clerk

Bernard Clark

Section 19.2-271.2. Testimony of husband and wife in criminal cases. - In criminal cases husband and wife shall be allowed, and, subject to the rules of evidence governing other witnesses, may be compelled to testify in behalf of each other, but neither shall be compelled, nor, without the consent of the other, allowed to be called as a witness against the other, except in the case of a prosecution for an offense committed by one against the other or against a minor child of either and except in the case either is charged with forgery of the name of the other or uttering or attempting to utter a writing bearing the allegedly forged signature of the other; but if either be called and examined in any case as a witness in behalf of the

other, the one so examined shall be deemed competent, and , subject to the exception stated in Section 8.01-398, may be compelled to testify against the other under the same rules of evidence governing other witnesses. The failure of either husband or wife to testify, however, shall create no presumption against the accused, nor be the subject of any comment before the court or jury by any attorney. In the prosecution for a criminal offense committed by one against the other or against a minor child of either not over sixteen years of age or against one charge with forgery of the name of the other, or uttering, or attempting to utter a writing bearing the allegedly forged signature of the other, each shall be a competent witness except as to privileged communications.

Section 19.2-299. Investigations and reports by probation officers in certain cases. - When a person is tried upon a felony charge, and is adjudged guilty of such charge, the court may, or on the motion of the defendant shall, before imposing sentence direct a probation officer of such court to thoroughly investigate and report upon the history of the accused and any and all other relevant facts, to the end that the court may be fully advised as to the appropriate and just sentence to be imposed. The probation officer, after having made this report available to counsel for the accused and the attorney for the Commonwealth by furnishing them with a copy for their permanent use at least five days prior thereto, shall

submit his report in advance of the sentencing hearing to the judge in chambers who shall keep such report confidential. The probation officer shall be available to testify from this report in open court in the presence of the accused who shall have been advised of the contents of the same and be given the right to cross-examine the investigating officer as to any matter contained therein and to present any additional facts bearing upon the matter which he may desire to present. The report of the investigating officer shall at all times be considered and kept confidential by each recipient thereof, and shall be filed as a part of the record in the case. Notwithstanding any provision of law to the contrary, any

report so filed shall be sealed upon the entry of the sentencing order by the court and made available only by court order, except that such reports or copies thereof shall be available at any time to any criminal justice agency, as defined in Section 9-169, of this or any other state or of the United States for any lawful purpose, and shall be made available to counsel for any person who has been indicted jointly for the same felony as the person subject to the report. Any report prepared pursuant to the provisions hereof shall without court order be made available to counsel for the person who is the subject to the report if that person is charged with a felony subsequent to the time of the preparation of the report. On and after January 1, 1982, in any case where a

presentence report is ordered pursuant to this section, it shall be in a form prescribed by the Department of Corrections. In all cases where such a report is not ordered, a simplified report shall be prepared on a form prescribed by the Department of Corrections.

Section 19.2-300. Deferring for mental examination sentence of person convicted of offense indicating sexual abnormality. - In the case of the conviction in any court of record of any person for any criminal offense which indicates sexual abnormality, the trial judge may on his own initiative, or shall upon application of the attorney for the Commonwealth, the defendant, or counsel for defendant or other person acting for the defendant, defer sentence until the report of a mental examination of the defendant can be secured to guide the judge in determining what disposition shall be made of the defendant.

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.